

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



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No. 74-1100

74-1100

**United States Court of Appeals**  
**For the Second Circuit**

\_\_\_\_\_  
**JOEL BREAKSTONE**  
**PLAINTIFF-APPELLANT**

v.

**JOHNSON STATE COLLEGE, et al.**  
**DEFENDANT-APPELLEES**

\_\_\_\_\_  
**ON APPEAL FROM A JUDGMENT OF THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT OF  
VERMONT**

\_\_\_\_\_  
**BRIEF OF APPELLEES**

\_\_\_\_\_  
**LATHAM, EASTMAN, SCHWEYER & TETZLAFF**  
**158 Bank Street**  
**Burlington, Vermont**

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## BRIEF OF APPELLEES

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### *ISSUE PRESENTED*

Is a College student entitled to a full, trial-type hearing prior to his suspension from College?

### *STATEMENT OF THE CASE*

During the academic year 1970-1971 Plaintiff was an undergraduate student at Johnson State College in Johnson, Vermont.

On Friday, December 11, 1970, as a result of information supplied by another student, officials of the college discovered an explosive device in the dormitory room of Plaintiff. The device consisted of a cardboard cylinder in which rocket propellant powder had been packed, sealed with wax and scotch taped. At the time the device was discovered it did not contain a fuse, although at an earlier time a fuse had been attached to it.

Initially, the administration of the College attempted to process this matter through the Johnson State College judicial system. However, the "magistrates" of the system refused to exercise jurisdiction and advised that the "civil authorities" should act upon the matter (Finding No. 11). Then, and only then, the Lamoille County law enforcement officials, including members of the Vermont State Police and State's Attorney Theodore Barnett, were notified by the administration of the College of the existence of the device.

On December 15, 1970, officers of the Vermont State Police interviewed college campus witnesses, including Plaintiff. The officers asked Plaintiff whether or not he obtained a fuse for the device; Plaintiff lied in response to these questions, stating he had not obtained a fuse when, in fact, he had (Finding No. 12).

In mid-December, the Vermont State Police made arrangements to have the device examined at the State Police Laboratory to determine its explosive capabilities. On or about December 14th, the President of the College advised Plaintiff that if the report received from the Laboratory indicated "the device was explosive and harmful to people and property" Plaintiff would be dismissed from College (Finding No. 14).

From the date of the discovery of the device to February 11, 1971, there were frequent and repeated discussions in person and by telephone between Plaintiff and members of the administration of the College, including President Craig and Dean Monticello, Defendants in this matter, concerning this incident. These discussions consisted, in part, of telephone calls made by Plaintiff "virtually every day" to Craig and Monticello during the Christmas recess. Plaintiff was made thoroughly aware of the nature of the charges against him as a result of these discussions and telephone conversations (Finding No. 17).

On February 11, 1971, nearly two months after the incident, the administration of the College advised Plaintiff orally that the State Laboratory report indicated the device was explosive and that Plaintiff was suspended from the College. On February 12, 1971, Plaintiff's suspension was confirmed by letter from the Administration (Finding No. 17).

Within four weeks, Plaintiff had filed suit in Federal Court, seeking a Temporary Restraining Order to effect his reinstatement in College, and to recover damages. The late Chief Judge Leddy of the District of Vermont did not rule on the Temporary Restraining Order at that time, but suggested that the judicial system of the College hear the matter.

On March 19th, the "all-college court" of the College held a full hearing into the matter. As a result of the hearing, Plaintiff was reinstated as a student, upon certain conditions. Subsequently, on March 31, the Appeals Court of the College modified the Order of the College Court, confirming, however, the reinstatement of Plaintiff upon certain conditions (Finding No. 18).

Following his reinstatement, Plaintiff has remained a student in good standing at Johnson State College to the present time (Finding No. 19).

### **PROCEEDINGS BELOW**

Plaintiff asserted that his right to procedural due process was violated by the procedure followed by the College, as outlined above. The District Court disagreed, found no violation of due process, and found in favor of Defendants Craig, Monticello and Johnson State College on that issue. Plaintiff has not contested the detailed Findings of Fact made by the Court, but Plaintiff has challenged the legal implications which the Court drew from the Facts.

### QUESTION PRESENTED

Under the circumstances of this incident, was the College obligated to provide Plaintiff with the full, formal proceedings traditionally associated with "procedural due process", prior to his suspension?

### ARGUMENTS

#### I

**PLAINTIFF HAD ADEQUATE NOTICE OF THE CHARGES AGAINST HIM AND MORE THAN ADEQUATE OPPORTUNITY TO CONTEST THE CHARGES: HIS RIGHTS TO DUE PROCESS WERE HONORED BY DEFENDANTS CRAIG AND MONTICELLO IN THEIR OFFICIAL CAPACITY AND DEFENDANT JOHNSON STATE COLLEGE.**

The record shows that the campus court of Johnson State College declined to exercise jurisdiction over this matter, despite the request of the administration that the matter be disposed of in that forum. Therefore, although the initial desire of the administration was to provide Plaintiff a hearing within the College judicial system, the matter was returned, unresolved, to the administration for resolution. What guidance did the administration have, at that point in late 1970, concerning their obligations under the due process clause of the Fourteenth Amendment?

In *Hannah v. Larch*, 363 U.S. 420 (1960), it was said,

"[A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceedings, and the possible burden on that proceedings, are all considerations which must be taken into account."

The general rule is expounded similarly in *Cafeteria and Restaurant Workers Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961) at 895:

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

It would be difficult to provide a college administrator with a more opaque mandate than that shown in the above Supreme Court opinions. In light of the extreme flexibility of the general rule concerning procedural due process, we submit that the administration of the College showed more than adequate sensitivity to the due process rights of Plaintiff.

It is undisputed that Plaintiff was advised, on or about December 14, 1970, that he would not be allowed to continue at the College if the State Laboratory Report indicated "the device was explosive and harmful to people and property" (Finding No. 14).

It is undisputed that Plaintiff had numerous communications with the administration of the College between December 14th and the time of his suspension, February 11, 1971 (Finding No. 17). Plaintiff cannot in good faith contend that he had no "opportunity" to present his version of the events.

It is instructive to note that the Supreme Court has recently reiterated its rejection of a rigid, formalistic approach to the requirements of procedural due process where agencies of the federal government are involved. In *Arnett v. Kennedy*, — U.S. —, 42 Law Week 4513 (April 16, 1974), an employee of the Civil Service was dismissed from employment. The former employee contended that his dismissal, made without a trial-type pre-removal hearing, violated his rights to procedural due process. The Court denied that such a hearing was mandated by the Constitution and stressed the undesirability of requiring "inflexible procedures" by an agency of the government to honor the procedural due process rights of an affected individual.

In short, the mandate of the most recent Supreme Court decision lends no clearer guidance to the administration of state colleges than the earlier cases concerning procedural due process. The "flexible" approach to due process reiterated by the Court over the past two decades substantiates the holding of the lower Court in this matter that, under the peculiar factual circumstances of this case, the administration of Johnson State College did not violate the Fourteenth Amendment rights of Plaintiff.

Similarly, the Court of Appeals for the Second Circuit has clearly rejected a strict, formalistic approach to procedural due process. Within this Circuit, it appears that the unique factual circumstances of each instance dictate the particular procedures that must be employed by a branch of the government to comport with procedural due process requirements.

In *Sostre v. McGinnis*, 442 F.2d 178 (1971), an inmate of a penal institution contended that his rights to due process were violated when an administrator of the prison unilaterally decided to place the Plaintiff in solitary confinement. Although the Plaintiff was not given the opportunity to cross-examine any witnesses testifying against him and was not provided with a formal, trial-type hearing, the Court held that there had not been a violation of the due process rights of the Plaintiff. The Court held that, since it was a relatively "simpler, more precise" proposition to determine whether a prison regulation was violated, there was correspondingly less need for cross-examination and calling of witnesses. The Court contrasted these factual circumstances with those presented in *Goldberg v. Kelly*, 397 U.S. 254, which dealt with the procedural requirements for terminating welfare benefits to comport with the due process clause of the Fourteenth Amendment.

In the case before this Court, the issue was crystal clear and could not have been simpler. The sole question was whether or not the State Laboratory of the State Police would find the device taken from plaintiff to be explosive in nature. We submit that it would have been a gratuitous and useless act to provide Plaintiff with a full hearing when there existed no factual issue whatsoever except the explosive potential of the device.

Moreover, Plaintiff was made thoroughly aware of the consequences, in the event the device were determined to be explosive; the Findings of Fact clearly show that Plaintiff was advised, for a period of approximately two months before his suspension, that he would be suspended in the event the device were found to be explosive. In *Farrell v. Joel*, 437 F.2d 160 (1971), in which a high school student challenged his suspension from school without a hearing, this Court indicated that the student's awareness of the probable consequences of the act which resulted in his suspension, combined with his notice of the rule under which he was suspended, made such a hearing unnecessary.

Perhaps the most instructive case in this Circuit for our purposes is *Winnick v. Manning*, 460 F.2d 545 (1972). In that case a college student was temporarily suspended, without a full trial-type hearing, for participation in a demonstration that disrupted examinations at his college. Approximately three weeks later a final hearing was held into the matter before a Dean of the College, after which the student was suspended for one semester.

The student brought suit, alleging violation of his right to procedural due process and specifically claiming that he should have had the right to cross-examine witnesses testifying against him. The Court held, however, that

"the right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings." (p. 549)

No clearer mandate could have been supplied to the administration of Johnson State College; although Plaintiff contends he was denied the right to cross-examine the chemist at the State Laboratory, due process in no way required that such cross-examination be allowed.

## II

*EVEN IF THE INITIAL PROCEDURE FOLLOWED BY THE COLLEGE WAS CONSTITUTIONALLY IRREGULAR, THE FULL HEARING ON MARCH 19, 1971 RENDERED ANY SUCH IRREGULARITY MOOT AND OF NO EFFECT.*

We submit alternatively, that any procedural irregularities in the preliminary suspension of February 11, 1971 were cured by the full hearing into the merits in March. Certainly, Plaintiff has not contended that the hearing in March in any way divested him of his rights to due process.

It is most significant, in the *Winnick* case, *supra*, that the Court found that

"Any procedural irregularities in the preliminary suspension hearing were cured by the full disciplinary hearing on June 2, which, in effect, was a trial de novo".

## III

*THE SUSPENSION OF FEBRUARY 11, 1971 WAS JUSTIFIED AS AN EMERGENCY MEASURE TO PROTECT THE HEALTH AND SAFETY OF THE COLLEGE COMMUNITY; IN PRACTICAL EFFECT IT CONSTITUTED A TEMPORARY SUSPENSION, IN FORCE UNTIL THE FULL HEARING ON MARCH 19, 1971.*

Even if this Court determines that the procedure followed by the College prior to February 11, 1971 did not constitute

"sufficient notice and opportunity for a hearing appropriate to the nature of the case" *Bell v. Burson*, 402 U.S. 535,

we submit that the continued presence of Plaintiff at the College constituted such a serious threat

"to the physical well-being of the student himself or the safety and well-being of other persons or university property", *Lafferty v. Carter*, 310 F.Supp. 465 (Wis. 1970),

that upon learning that the device was indeed explosive in nature, the College was authorized to remove Plaintiff from the campus forthwith. In *Stricklin v. Regents of the University of Wisconsin*, 297 F.Supp. 416 (W.D. Wis. 1969), the Court indicated that whether or not suspension could legally occur without specification of charges, notice of hearing, and hearing, turned on "whether the element of danger to persons or property" was present.

Within approximately five weeks of Plaintiff's suspension, he was given the full range of due process rights he demanded in his Complaint. The suspension of February 12, 1971, in practical effect, was a temporary suspension effective only for the period of February 12, 1971 to March 19, 1971. If this Court should determine that Plaintiff's rights to due process were not met prior to February 12, 1971, we submit that the administration of the College was justified in removing Plaintiff from the College premises during the period February 12, 1971 through March 19, 1971; the College administration reasonably concluded that the presence of Plaintiff at the College constituted a threat of harm to students and College property.

#### IV

#### **DEFENDANTS CRAIG AND MONTICELLO POSSESSED A QUALIFIED PRIVILEGE WHICH INSULATED THEM FROM LIABILITY UNDER SECTION 1983.**

The Findings of Fact numbered twenty-one through thirty-one, thirty-four and thirty-eight, all of which are not contested by Plaintiff, clearly show that these Defendants were performing their official duties in good faith at all relevant times. Under these circumstances, the law is plain that there can be no individual liability under 42 U.S.C. § 1983. *Curry v. Gillette*, 461 F.2d 1003 (6th Cir. 1972).

## CONCLUSION

Defendant College, and Defendants Craig and Monticello, were hobbled in this matter by the refusal of the judicial system of the College to take jurisdiction over this case. Forced to resort to their own ad hoc procedures, they were scrupulously careful to provide Plaintiff with adequate notice of all steps to be taken against him and numerous opportunities to communicate his version of events to them.

Absent a clear mandate from the Court to the College administration showing the precise procedures to be followed, it would be patently unfair to characterize the steps that they did take as inadequate constitutionally. Conversely, it would be inappropriate to find that the treatment received by Plaintiff operated to his prejudice. He had numerous conversations with the "hearing officer", in this instance, President Craig; numerous opportunities to present his side of the story and almost two months' notice of the consequences in the event the device proved to be "explosive" in nature. Moreover, five months after the preliminary suspension of Plaintiff, he was afforded a complete trial-type hearing, with the full panoply of procedural due process rights; the record discloses that Plaintiff has continued to the present as a student in good standing as a result of the procedures afforded him by the College.

Respectfully submitted,

  
LATHAM, EASTMAN, SCHWEYER & TETZLAFF

